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BANK KERJASAMA RAKYAT MALAYSIA BHD v. GM HEALTHCARE SDN BHD & ORS

FEDERAL COURT, PUTRAJAYA
NALLINI PATHMANATHAN FCJ
HASNAH MOHAMMED HASHIM FCJ
B RHODZARIAH BUJANG FCJ
[CIVIL APPEAL NO: 02(f)-62-10-2023 (W)]
14 MARCH 2024

Abstract – *(i) A breach of a financing facility agreement results in a claim in damages accruing to the borrower, which is separate and distinct from the overriding obligation of the borrower to repay the monies disbursed and used by the borrower; (ii) If a bank is notified of an application to obtain a Mareva injunction, this in itself, is sufficient to put the bank on notice to be vigilant and careful about the monies sought to be preserved. A bank cannot be faulted for taking the cautious and prudent step to stay its hand in the face of the adjudication by the court. It cannot take the risk of pre-empting or rendering nugatory any subsequent order the court might make.*

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BANKING: *Banks and banking business – Financing facilities agreement – Recovery action by bank for monies owed – Whether there was breach of facility agreement when bank failed to release surplus funds for interim payments – Whether breach exonerated principal borrower and guarantors from recovery of monies disbursed to borrower by way of loan and remaining due and outstanding to bank – Whether bank had valid cause of action against guarantors*

This appeal was related to the relatively standard provision for financing facilities by the bank ('appellant') to its customer for the purpose of a hospital construction project which subsequently failed. Jabatan Kerja Raya ('JKR') awarded the project to Sunshine Fleet, the main contractor ('SF'), who in turn appointed GM Healthcare Sdn Bhd ('GMH') as its subcontractor for the construction of the remaining and remedial parts of the construction. The earlier subcontractor's contract had been terminated, so GMH was appointed specifically to complete the project. A financing facility in the total sum of RM64,130,000 was granted to GMH to finance its works in conjunction with the subcontract. Apart from the primary financing facility agreement ('FFA'), several other agreements, namely asset sale and purchase agreements and joint and several guarantees from the fourth, fifth and sixth respondents as well as a corporate guarantee from the third respondent were also executed. As additional security, the bank obtained a third party assignment, namely an assignment of the monies that SF, the main contractor, was to pay GMH. This meant that once a claim by GMH was certified and the contract proceeds paid by JKR to SF, the latter would pay

such monies into a designated account with the bank known as the project account. The bank would then deduct an amount agreed to by GMH towards repayment of the financing facility and release the balance proceeds to GMH. To secure these payments, deeds of assignment were executed, namely: (i) a third party deed of assignment (project account) dated 22 May 2009 ('May DOA') pursuant to which SF agreed to absolutely assign the project account monies being sums due to them from JKR, as well as all rights, benefits, title and interests of SF in the project account to the bank. This was in consideration of the bank providing financing facilities to GMH; (ii) a surat ikatan penyerahan hak (dengan cara sekuriti pembayaran kontrak) dated 16 July 2009 ('July DOA') pursuant to which SF similarly assigned to the bank all monies, including rights, benefits, profits and interests paid to SF from JKR. The project proceeded. As the pattern of events bear out, surplus amounts from the project account were paid, with the agreement of SF and GMH to GMH's account or SF's account. Instructions were given to the bank and neither party took issue. However, disputes arose from the 18th to the 24th interim payments. Interim payments for certificates numbers 18, 19, 22 and 23 were paid into GMH's account while the proceeds for interim certificates 20 and 21 were paid into SF's account, premised on instructions from GMH *vide* letters. In 2010, disputes arose between GMH and SF as to the entitlement of surplus amounts for interim certificates number 24 onwards. The bank duly notified the parties that it would not be involved in any dispute involving them. It, however, stipulated that it would disburse monies directly to GMH's subcontractors to facilitate the construction of the hospital project and hold the surplus until the dispute was resolved or a court order obtained. The bank proceeded to pay the subcontractors, vendors and suppliers of GMH for interim certificates 24 to 28. On 4 June 2010, SF commenced civil proceedings and sought a *Mareva* injunction against GMH and the bank restraining them from dealing with any of the surplus amounts from the contract proceeds. On 7 June 2010, interim payment certificate number 29 was received by the bank. Notice of an application for a *Mareva* injunction was served on the bank on 11 June 2010. The bank took the position that it had no choice but to withhold payments, including those to third party subcontractors, vendors and suppliers. SF took the position that GMH had caused the project to stall and sought to terminate the subcontract on the grounds that the bank was no longer financing the project. SF also brought a claim against the bank, claiming that it had failed to pay the surplus amounts from interim payments numbers 24 to 32 into its account and had instead paid GMH. It also alleged a breach of an assignment, namely the July DOA. GMH constituted a counterclaim against SF and the bank, where it contended, *vis-à-vis* the bank that the latter breached its financing facilities by failing to release the surplus funds for interim payments from numbers 29 to 30 to its third party subcontractors, vendors and suppliers. By way of a recovery action for the monies owed to it under the financing facilities, the bank instituted a counterclaim against GMH and the guarantors. In essence,

the bank pointed to the termination of the hospital project by JKR, which constituted an event of default under the FFA, pursuant to which GMH was obliged to repay the outstanding amount due to the bank pursuant to s. 7.01(18) of the FFA as well as cl. 11 of the asset sale agreement. So too the guarantors pursuant to cl. 1 of the joint and several guarantee. As of that date, a sum of RM47,332,740.36 had been disbursed. The recovery was for the outstanding balance of RM24,004,368.53 plus interest and *ta'wid*. The guarantors also brought a counterclaim against the bank (i) maintaining that the bank's counterclaim for recovery of the outstanding balance they had guaranteed, was procedurally defective for failing to join SF; (ii) that the bank had no cause of action because it had only issued notices of demand against the guarantors on 29 October 2010, while the original writ was instituted in or around 11 June 2010 by SF; (iii) that the bank had breached an agreement between SF and the bank relating to the treatment of the contract proceeds paid into the project account. At the High Court, the trial judge, in allowing the counterclaims of the GM and the guarantors and dismissing the bank's counterclaim, held that the bank had breached the FFA and that the said breach exonerated the primary debtor, GMH and the guarantors, from repaying any part of the remaining outstanding debt due and owing to the bank. The Court of Appeal dismissed the bank's appeal (as well as SF's appeal), affirming the decision of the High Court. The Federal Court granted leave for several questions of law to be determined, *inter alia*; (i) whether the breach of a facility agreement by a bank exonerates the principal borrower and thereby guarantors from recovery of monies disbursed to the borrower by way of a loan and remaining due and outstanding to the bank; (iii) was there a breach of the FFA; and (iii) whether the bank enjoyed a valid cause of action against the guarantors.

Held (allowing appeal)

Per Nallini Pathmanathan, Hasnah Mohammed Hashim, Rhodzariah Bujang FCJJ delivering the judgment of the court:

(1) The conclusion of the trial court, and affirmed by the Court of Appeal, was that the alleged breach by the bank resulted in an exoneration of GMH's liabilities owed to the bank. What this meant was that every time a bank was found to have breached its 'obligations' under the agreement lending monies to a customer, the customer is then exonerated, absolved, exculpated, cleared and freed of repaying any part of the debt, notwithstanding that millions of ringgit may have been disbursed by the banking institution to the customer. The effect on the banking and financing industry would be that loans would become irrecoverable simply by reason of an allegation of a breach made by the customer. There is no proposition of law that underlies such a legal conclusion. The courts below have failed to comprehend or apply the trite legal principle that a breach of the FFA resulted in a claim in

damages accruing to the borrower, which is separate and distinct from the overriding obligation of the borrower to repay the monies disbursed and used by the borrower. (paras 24-28)

(2) The bank, having notice of the dispute between SF and GMH, and more particularly having been served with the notice of the application for an injunction, could not simply proceed to disburse monies to third party contractors under the guise of the 'ordinary course of business' clause. It was those very monies that comprised the subject matter of the dispute between the parties. The fact that the bank was notified of the application to obtain a *Mareva* injunction by SF was, in itself, sufficient to put the bank on notice to be vigilant and careful about the monies sought to be preserved. As the monies sought to be preserved were the very monies which GMH sought disbursement of to third party contractors, the bank could not be faulted for taking the cautious and prudent step to stay its hand in the face of the adjudication by the court. It could not take the risk of pre-empting or rendering nugatory any subsequent order the court might make. It was clear that the bank did not breach its obligations by failing to disburse monies to GMH's third party contractors. (paras 35-40)

(3) The bank's counterclaim was a separate action (O. 15 r. 2 of the Rules of Court 2012 ('ROC') and s. 31 of the Limitation Act 1953). This, in turn, meant that the claim by the bank against the guarantors *vide* the counterclaim was instituted after the issuance of the demands to the guarantors on 29 October 2010. There was no proper basis to apply the 'relation back' theory to the case at hand because the bank's claim against the guarantors was separate and distinct from SF's or GMH's causes of action against the bank. The bank's counterclaim against GMH was an independent action which stood on its own. Therefore, in determining the date of the bank's recovery action, it stood to reason that the correct date, applying O. 15 r. 2 of the ROC, was 1 March 2011. The bringing of that action by the bank could not be related back to SF's writ or claim against GMH and the bank because firstly, the relation back theory has no application here and secondly, such a counterclaim takes effect from the date of its filing. Therefore, the submission by the guarantors that the relation back theory takes the date of the bank's counterclaim back to June 2010, namely the date of SF's writ, was flawed. As of 1 March 2011, the notices of demand had been issued to the guarantors. These notices were issued on 29 October 2010. Therefore, the reality was that the bank enjoyed a cause of action against the guarantors as of 1 March 2011. The courts below erred in applying the relation back theory to conclude that there was no valid cause of action against the guarantors. (paras 45-49)

A ***Bahasa Melayu*** *Headnotes*

Rayuan ini berkaitan dengan peruntukan kemudahan pembiayaan oleh bank ('perayu') kepada pelanggannya untuk tujuan projek pembinaan hospital yang kemudiannya gagal. Jabatan Kerja Raya ('JKR') mengawardkan projek itu kepada Sunshine Fleet, kontraktor utama ('SF') yang seterusnya melantik
B GM Healthcare Sdn Bhd ('GMH') sebagai subkontraktor untuk pembinaan bahagian yang belum siap dan pemulihan pembinaan. Kontrak subkontraktor terdahulu telah ditamatkan, dan GMH dilantik khusus untuk menyiapkan projek tersebut. Kemudahan pembiayaan berjumlah RM64,130,000 telah diberikan kepada GMH untuk membiayai kerja-kerja yang berkaitan dengan
C subkontrak itu. Selain perjanjian kemudahan pembiayaan utama ('FFA'), beberapa perjanjian lain, iaitu perjanjian penjualan dan pembelian aset dan beberapa jaminan bersama daripada responden keempat, kelima dan keenam serta jaminan korporat daripada responden ketiga turut dilaksanakan. Sebagai keselamatan tambahan, bank memperoleh serahan hak pihak ketiga, iaitu
D serahan hak wang yang SF, kontraktor utama, akan membayar GMH. Ini bermakna sebaik sahaja tuntutan oleh GMH diperakui dan hasil daripada kontrak dibayar oleh JKR kepada SF, SF akan membayar wang tersebut ke dalam akaun yang ditetapkan iaitu akaun projek. Bank kemudiannya akan memotong jumlah yang dipersetujui oleh GMH untuk pembayaran balik
E kemudahan pembiayaan dan melepaskan hasil baki kepada GMH. Demi mendapatkan pembayaran ini, surat ikatan penyerahan hak telah dilaksanakan, iaitu: (i) surat penyerahan hak (akaun projek) pihak ketiga bertarikh 22 Mei 2009 ('DOA bulan Mei') yang mana SF bersetuju untuk menyerah hak wang akaun projek secara mutlak mereka daripada JKR, serta semua hak, faedah, tajuk dan kepentingan SF dalam akaun projek kepada
F bank. Ini adalah sebagai pertimbangan bank yang menyediakan kemudahan pembiayaan kepada GMH; (ii) satu surat ikatan penyerahanhak (dengan cara sekuriti pembinaan kontrak) bertarikh 16 Julai 2009 ('DOA bulan Julai') yang mana SF juga menyerahhak kepada bank semua wang, termasuk hak, faedah, keuntungan dan faedah yang dibayar kepada SF daripada JKR. Projek
G diteruskan. Jumlah lebihan daripada akaun projek telah dibayar, dengan persetujuan SF dan GMH, ke akaun GMH atau akaun SF. Arahan telah diberikan kepada bank dan kedua-dua pihak tidak mempertikaikannya. Walau bagaimanapun, pertikaian timbul bermula pembayaran interim ke-18 hingga ke-24. Bayaran interim untuk sijil nombor 18, 19, 22 dan 23 telah
H dibayar ke dalam akaun GMH manakala hasil untuk sijil interim 20 dan 21 telah dibayar ke dalam akaun SF, berdasarkan arahan GMH melalui surat. Pada 2010, pertikaian timbul antara GMH dan SF tentang kelayakan jumlah lebihan untuk sijil interim nombor 24 dan seterusnya. Bank dengan sewajarnya memberitahu pihak-pihak tersebut bahawa bank tidak akan
I terlibat dalam apa-apa pertikaian yang melibatkan mereka. Bank, bagaimanapun, menetapkan bahawa bank akan mengeluarkan wang terus kepada subkontraktor GMH untuk memudahkan pembinaan projek hospital

dan memegang lebihan sehingga pertikaian diselesaikan atau perintah mahkamah diperolehi. Bank terus membayar subkontraktor, vendor-vendor dan pembekal-pembekal GMH untuk sijil interim 24 hingga 28. Pada 4 Jun 2010, SF memulakan prosiding sivil dan memohon injunksi *Mareva* terhadap GMH dan bank, menghalang mereka daripada menguruskan apa-apa jumlah lebihan daripada hasil kontrak. Pada 7 Jun 2010, sijil pembayaran interim bernombor 29 telah diterima oleh pihak bank. Notis permohonan untuk injunksi *Mareva* telah diserahkan kepada bank pada 11 Jun 2010. Bank mengambil pendirian bahawa bank tidak mempunyai pilihan selain menahan pembayaran, termasuk pembayaran kepada subkontraktor, vendor-vendor dan pembekal-pembekal pihak ketiga. SF mengambil pendirian bahawa GMH telah menyebabkan projek itu terhenti dan berusaha untuk menamatkan subkontrak atas alasan bank tidak lagi membiayai projek itu. SF juga membuat tuntutan terhadap bank, mendakwa bahawa bank gagal membayar jumlah lebihan daripada pembayaran interim nombor 24 hingga 32 ke dalam akaunnya dan sebaliknya membayar GMH. SF juga mendakwa bahawa penyerahan hak telah dilanggar iaitu DOA Julai. GMH juga membuat tuntutan balas terhadap SF dan bank, menghujahkan bahawa bank melanggar kemudahan pembiayaannya kerana gagal mengeluarkan lebihan dana untuk pembayaran interim daripada nombor 29 hingga 30 kepada subkontraktor, vendor-vendor dan pembekal-pembekal pihak ketiganya. Melalui tindakan tuntutan untuk wang yang terhutang kepadanya bawah kemudahan pembiayaan, bank memulakan tuntutan balas terhadap GMH dan penjamin-penjamin. Pada dasarnya, bank menyatakan penamatan projek hospital oleh JKR sebagai pelanggaran bawah FFA, yang mewajibkan GMH membayar balik jumlah tertunggak yang perlu dibayar kepada bank menurut s. 7.01(18) FFA serta kl. 11 perjanjian jualan aset. Begitu juga penjamin-penjamin menurut klausa jaminan bersama. Sehingga tarikh itu, sejumlah RM47,332,740.36 telah dibayar. Tuntutan adalah untuk baki tertunggak sebanyak RM24,004,368.53 ditambah faedah dan *ta'wid*. Penjamin juga membuat tuntutan balas terhadap bank, (i) dengan mengekalkan bahawa tuntutan balas bank untuk mendapatkan semula baki tertunggak yang telah mereka jamin, adalah defektif dari segi prosedur kerana gagal menyertai SF; (ii) bahawa bank tidak mempunyai kausa tindakan kerana hanya mengeluarkan notis permohonan terhadap penjamin pada 29 Oktober 2010, manakala writ asal telah dimulakan pada atau sekitar 11 Jun 2010 oleh SF; dan (iii) bank telah melanggar perjanjian antara SF dan bank berkaitan dengan cara hasil kontrak yang dibayar ke dalam akaun projek ditangani. Di Mahkamah Tinggi, hakim bicara, dalam membenarkan tuntutan balas GM dan penjamin-penjamin dan menolak tuntutan balas bank, memutuskan bahawa bank telah melanggar FFA dan pelanggaran tersebut membebaskan penghutang utama, GMH dan penjamin-penjamin, daripada membayar balik mana-mana bahagian baki hutang tertunggak yang perlu dibayar dan terhutang pada bank. Mahkamah Rayuan menolak rayuan bank (dan juga rayuan SF) dan mengesahkan keputusan Mahkamah Tinggi. Mahkamah

Persekutuan memberi kebenaran untuk penentuan beberapa persoalan undang-undang, antara lain; (i) sama ada pelanggaran perjanjian kemudahan pembiayaan oleh bank membebaskan peminjam utama dan, dengan itu, penjamin daripada pemulihan wang yang diagihkan kepada peminjam melalui pinjaman dan baki perlu dibayar dan tertunggak kepada bank; (iii) sama ada terdapat pelanggaran FFA; dan (iii) sama ada bank mempunyai kausa tindakan sah terhadap penjamin-penjamin.

Diputuskan (membenarkan rayuan)
Oleh Nallini Pathmanathan, Hasnah Mohammed Hashim, Rhodzariah Bujang HHMP menyampaikan penghakiman mahkamah:

(1) Kesimpulan mahkamah bicara, dan disahkan oleh Mahkamah Rayuan, adalah bahawa dakwaan pelanggaran oleh bank menyebabkan pembebasan liabiliti GMH yang terhutang pada bank. Maksudnya, setiap kali bank didapati melanggar kewajipannya bawah perjanjian meminjamkan wang kepada pelanggan, pelanggan itu kemudiannya dikecualikan dan dibebaskan daripada membayar balik mana-mana bahagian hutang, walaupun berjuta-juta ringgit mungkin telah dikeluarkan oleh institusi perbankan kepada pelanggan. Kesan atas industri perbankan dan pembiayaan ialah pinjaman tidak boleh diperoleh semula hanya kerana dakwaan pelanggaran yang dibuat oleh pelanggan. Tiada peruntukan undang-undang yang mendasari kesimpulan sedemikian dari segi undang-undang. Mahkamah bawahan gagal memahami atau menggunakan prinsip undang-undang yang matan bahawa pelanggaran FFA yang mengakibatkan tuntutan ganti rugi yang terakru pada peminjam, berasingan dan berbeza daripada kewajipan utama peminjam untuk membayar balik wang yang dikeluarkan dan digunakan oleh peminjam.

(2) Bank, yang mengetahui tentang pertikaian antara SF dan GMH, dan lebih khusus lagi telah diserahkan dengan notis permohonan untuk mendapatkan injunksi, tidak boleh meneruskan pengeluaran wang kepada kontraktor pihak ketiga dengan berselindung sebalik klausa 'urusan perniagaan biasa'. Wang tersebutlah yang merangkumi perkara pertikaian antara pihak-pihak. Hakikat bahawa bank telah dimaklumkan tentang permohonan untuk mendapatkan injunksi *Mareva* oleh SF, dengan sendirinya, sudah memadai untuk memberi notis pada bank untuk berwaspada dan berhati-hati tentang wang yang ingin dilindungi. Oleh kerana wang yang ingin dilindungi adalah wang yang GMH meminta pengeluarannya kepada kontraktor pihak ketiga, bank tidak boleh disalahkan kerana mengambil langkah berhati-hati dan berhemat untuk kekal dengan pendiriannya dalam menghadapi penghakiman oleh mahkamah. Bank tidak boleh mengambil risiko menghalang atau menafikan apa-apa perintah yang mungkin diputuskan oleh mahkamah. Jelas bahawa bank tidak melanggar kewajipannya apabila gagal membayar wang kepada kontraktor pihak ketiga GMH.

(3) Tuntutan balas bank adalah tindakan berasingan (A. 15 k. 2 Kaedah-Kaedah Mahkamah 2012 ('KKM') dan s. 31 Akta Had Masa 1953). Ini seterusnya bermakna bahawa tuntutan oleh bank terhadap penjamin melalui tuntutan balas telah dimulakan selepas pengeluaran tuntutan kepada penjamin pada 29 Oktober 2010. Tiada asas yang wajar untuk menggunakan teori 'relation back' dalam kes ini kerana tuntutan bank terhadap penjamin adalah berasingan dan berbeza daripada kausa tindakan SF atau GMH terhadap bank. Tuntutan balas bank terhadap GMH ialah tindakan bebas berasingan. Oleh itu, dalam menentukan tarikh tindakan pemerolehan semula bank, adalah wajar bahawa tarikh yang betul, menurut A. 15 k. 2 KKM, ialah 1 Mac 2011. Tindakan oleh bank tidak boleh dikaitkan kembali pada writ atau tuntutan SF terhadap GMH dan bank kerana pertama, teori 'relation back' tidak diguna pakai di sini dan kedua, tuntutan balas sedemikian berkuat kuasa dari tarikh pemfailannya. Oleh itu, hujahan penjamin bahawa teori 'relation back' mengambil tarikh tuntutan balas bank kembali ke Jun 2010, iaitu tarikh writ SF, adalah cacat. Sehingga 1 Mac 2011, notis tuntuan telah dikeluarkan kepada penjamin-penjamin. Notis-notis ini telah dikeluarkan pada 29 Oktober 2010. Oleh itu, realitinya adalah bahawa bank mempunyai kausa tindakan terhadap penjamin-penjamin pada 1 Mac 2011. Mahkamah di bawah telah terkhilaf apabila menggunakan teori 'relation back' untuk membuat kesimpulan bahawa bank tidak ada kausa tindakan sah terhadap penjamin-penjamin.

Case(s) referred to:

Alloy Consolidated Sdn Bhd v. Dato' Dr Hj Adam Harun [2011] 5 CLJ 705 FC ***(refd)***
Bank Bumiputra Malaysia Bhd Kuala Trengganu v. Mae Perkayuan Sdn Bhd & Anor [1993] 2 CLJ 495 SC ***(foll)***
Customs And Excise Commissioners v. Barclays Bank Plc [2007] 1 AC 181 ***(refd)***
Harrow London Borough Council v. Johnstone [1997] 1 WLR 459 ***(refd)***
Jasa Keramat Sdn Bhd v. Monatech (M) Sdn Bhd [2001] 4 CLJ 549 CA ***(refd)***
Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd [2002] 4 CLJ 401 FC ***(refd)***
The "Jarguh Sawit" [1997] 1 SLR(R) 213 ***(refd)***
Z Ltd v. A & Ors [1982] 1 All ER 556 ***(refd)***

Legislation referred to:

Limitation Act 1953, s. 31
Rules of Court 2012, O. 15 r. 2

For the appellants - Cyrus Das, Malik Imtiaz Sarwar & Wong Ming Yen; M/s Malik Imtiaz Sarwar
For the respondents - T Gunaseelan, Keshvinjeet Singh, Uma Gunaseelan & Kumaradevan Rajadevan; M/s Gunaseelan & Assocs
Arbain Aziz; T/n Law Chambers of Arbain Aziz

Reported by Suhainah Wahiduddin

A

JUDGMENT
(Ex-Tempore)

Nallini Pathmanathan, Hasnah Mohammed Hashim, Rhodzariah Bujang FCJJ:

B **[1]** We are of the unanimous view that the appeal should be and is hereby allowed with costs.

[2] This appeal relates to the relatively standard provision for financing facilities by Bank Kerjasama Rakyat Malaysia Berhad, the appellant, a bank ('bank') to its customer for the purpose of a hospital construction project C which subsequently failed. Jabatan Kerja Raya ('JKR') awarded the project to Sunshine Fleet, the main contractor ('SF'), who in turn appointed GM Healthcare Sdn Bhd ('GMH') as its subcontractor for the construction of the remaining and remedial parts of the construction. The earlier subcontractor's contract had been terminated, so GMH was appointed specifically to D complete the project.

[3] The current claim in this appeal relates to a counterclaim brought by the bank against, *inter alia*, GMH and its guarantors for the remaining outstanding balance of RM24,003,368.53 together with '*ta'wid*' or compensation at the rate of 1% and interest at 8% from the date of E termination or cessation of the hospital project by JKR. The dispute centres on the bank's treatment of contract proceeds paid by JKR *via* interim payments which were assigned by Sunshine Fleet, the main contractor to the bank.

Salient Facts

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[4] GMH is the bank's client to whom a financing facility in the total sum of RM64,130,000 was granted to finance its works in conjunction with the subcontract. Apart from the primary financing facility agreement dated 22 May 2009, several other agreements, namely several asset sale and purchase agreements and joint and several guarantees from the fourth, fifth G and sixth respondents as well as a corporate guarantee from the third respondent were also executed on the same date.

[5] As additional security, the bank obtained a third party assignment, namely an assignment of the monies that Sunshine Fleet, the main contractor, H was to pay GMH. This meant that once a claim by GMH was certified and the contract proceeds paid by JKR to Sunshine Fleet, the latter would pay such monies into a designated account with the bank known as the project account. The bank would then deduct an amount agreed to by GMH towards repayment of the financing facility and release the balance proceeds to GMH. The amount deductible by the bank from these contract proceeds towards I repayment of the banking facilities was 10% (being payment of sale price and 5% for the sinking fund).

[6] To secure these payments, deeds of assignment were executed, namely:

(i) a third party deed of assignment (project account) dated 22 May 2009 ('the May DOA') pursuant to which Sunshine Fleet agreed to absolutely assign the project account monies being sums due to them from JKR, as well as all rights, benefits, title and interests of SF in the project account to the bank. This was in consideration of the bank providing financing facilities to GMH;

(ii) a surat ikatan penyerahan hak (dengan cara sekuriti pembayaran kontrak) dated 16 July 2009 ('the July DOA') pursuant to which Sunshine Fleet similarly assigned to the bank all monies, including rights, benefits, profits and interests paid to SF from JKR.

[7] The project proceeded. As the pattern of events bear out, surplus amounts from the project account were paid, with the agreement of SF and GMH to GMH's account with Asian Finance Bank Bhd or SF's account with Maybank Islamic. Instructions were given to the bank and neither party took issue.

[8] However disputes arose from the 18th to the 24th interim payments. Interim payments for certificates numbers 18, 19, 22 and 23 were paid into GMH's AF account while the proceeds for interim certificates 20 and 21 were paid into Sunshine Fleet's instructions premised on instructions from GMH *vide* letters.

[9] In 2010, disputes arose between GMH and SF as to the entitlement of surplus amounts for interim certificates number 24 onwards. The bank was not privy to this dispute. The bank duly notified the parties that it would not be involved in any dispute involving them. It however stipulated that it would disburse monies directly to GMH's subcontractors to facilitate the construction of the hospital project and hold the surplus until the dispute was resolved or a court order obtained. The bank proceeded to pay the subcontractors, vendors and suppliers of GMH for interim certificates 24 to 28.

[10] On 4 June 2010, SF commenced civil proceedings and sought a *Mareva* injunction against GMH and the bank, restraining them from dealing with any of the surplus amounts from the contract proceeds. Therefore, surplus amounts from interim payment number 29 to 32 became the subject matter of heavy dispute and gave rise to the events culminating in this appeal.

[11] On 7 June 2010, interim payment certificate number 29 was received by the bank. Notice of an application for a *Mareva* injunction was served on the bank on 11 June 2010. The bank took the position that it had no choice but to withhold payments, including those to third party subcontractors, vendors and suppliers. GMH disputed this, maintaining that by failing to make those payments, the bank had breached the financing facilities. The application for a *Mareva* injunction was then pending in court.

[12] SF in turn took the position that GMH had caused the project to stall and sought to terminate the subcontract on the grounds that the bank was no longer financing the project.

[13] JKR terminated the award to SF on the grounds of poor performance, namely its failure to proceed with the works regularly and diligently. That issue became the subject matter of another suit, which was ultimately dismissed by both the High Court and the Court of Appeal. In short, JKR's termination of the award to SF was upheld as being valid and justified.

[14] SF also brought a claim against the bank, claiming that it had failed to pay the surplus amounts from interim payments numbers 24 to 32 into its MBB account and had instead paid GMH. It also alleged a breach of an assignment, namely the July DOA.

[15] GMH instituted a counterclaim against SF and the bank, where it contended *vis-à-vis* the bank that the latter breached its financing facilities by failing to release the surplus funds for interim payments from 29 and 30 to its third party subcontractors, vendors and suppliers. That dispute comprises an issue in the current appeal.

[16] By way of a recovery action for the monies owed to it under the financing facilities, the bank instituted a counterclaim against GMH and the guarantors. This comprises the subject matter of today's appeal. In essence, the bank pointed to the termination of the hospital project by JKR, which constituted an event of default under the financing facility agreement, pursuant to which GMH was obliged to repay the outstanding amount due to the bank pursuant to s. 7.01(18) of the FFA as well as cl. 11 of the asset sale agreement. So too the guarantors pursuant to cl. 1 of the joint and several guarantee. As of that date, a sum of RM47,332,740.36 had been disbursed. The recovery was for the outstanding balance of RM24,004,368.53 plus interest and *ta'wid*.

[17] The guarantors also brought a counterclaim against the bank, maintaining that the bank's counterclaim for recovery of the outstanding balance they had guaranteed, was procedurally defective for failing to join Sunshine Fleet; secondly, that the bank had no cause of action because it had only issued notices of demand against the guarantors on 29 October 2010, while the original writ was instituted in or around 11 June 2010 by SF. Finally, that the bank breached an agreement between SF and the bank relating to the treatment of the contract proceeds paid into the project account.

The High Court Judgment

[18] Dealt with by way of a retrial, the trial judge allowed GM. Its counterclaim and the guarantors' counterclaim and dismissed the bank's counterclaim.

[19] The judge found that the bank had breached the financing facilities agreement. This was because the bank ought to have released the monies to GMH's third party subcontractors, vendors and suppliers notwithstanding the *Mareva* application. Its failure to do so was in breach of GMH's instructions.

[20] At paras. 239 and 284(p) of the judgment, the trial judge went on to hold that the said breach of the financing facility agreement by the bank exonerated the primary debtor, GMH and the guarantors from repaying any part of the remaining outstanding debt due and owing to the bank. This in effect meant that the bank had no basis for its counterclaim.

[21] The judge went on to hold that the bank's counterclaim was procedurally defective as it had no nexus with SF's claim against the bank and the bank had no cause of action at the time when the High Court suit was filed.

The Court Of Appeal Judgment

[22] The Court of Appeal dismissed the bank's appeal (as well as SF's appeal) affirming the decision of the High Court.

The Federal Court

[23] The Federal Court granted leave for six questions of law to be determined. The primary issues for consideration are:

Issue 1: Whether The Breach Of A Facility Agreement By A Bank Exonerates The Principal Borrower And Thereby Guarantors From Recovery Of Monies Disbursed To The Borrower By Way Of A Loan And Remaining Due And Outstanding To The Bank? This Comprises The Subject Matter Of Question 1

[24] It brings to the fore the legal coherence of the conclusion of the trial court that the alleged breach by the bank, results in an exoneration of GMH's liabilities owed to the bank. This is what the High Court stated:

> 239 … there was an established course of dealing and the Bank had committed breach of contract by failing to make payment to the AFB Account or to pay GMH's suppliers and sub-contractors. *In the result, I hold that GMH succeeds in the claim for breach of contract against the Bank. GMH as the principal debtor is therefore exonerated from liability under the Banking facility.* It was agreed by Counsel for the Bank that if GMH succeeds in its counterclaim against the Bank for breach of contract, then the Bank's claim against the guarantors will automatically fall …
>
> 240. Hence since GMH has succeeded in establishing that the Bank was in breach of contract, it follows that the guarantors are consequently exonerated from any liability under the guarantees. The Bank will therefore pay damages to GMH for breach of contract, which is to be assessed in due course …

> 284(p) ... As such the Bank breached its obligations to GMH and the latter are thereby discharged from their obligations under the facilities agreement which was wrongfully recalled and terminated by the Bank. (emphasis added)

[25] These findings were approved and affirmed by the Court of Appeal. What this means is that every time a bank is found to have breached its 'obligations' under the agreement lending monies to a customer, the customer is then exonerated, absolved, exculpated, cleared and freed of repaying any part of the debt, notwithstanding that millions of ringgit may have been disbursed by the banking institution to the customer. Needless to say, the effect on the banking industry and the commercial field as a whole would be disastrous. Taken to its logical end, it means that when banks lend money requiring repayment with interest over a certain period and on certain terms, the minute there is a breach of the bank's obligations, there can be no question of recovery of monies whatsoever from that customer. The borrower would be freed of his contracted obligations altogether. The effect on the banking and financing industry would be that loans would become irrecoverable simply by reason of an allegation of a breach made by the customer.

[26] Perhaps more relevantly, there is no proposition of law that underlies such a legal conclusion.

[27] There is no clause in the agreement that allows for such a proposition to be made. Neither is there any such proposition of law in the Contracts Act 1950.

[28] The courts below have failed to comprehend or apply the trite legal principle that a breach of the financing facility agreement results in a claim in damages accruing to the borrower, which is separate and distinct from the overriding obligation of the borrower to repay the monies disbursed and used by the borrower. This is a basic tenet of contract and banking law.

[29] The correct approach is as set out in *Bank Bumiputra Malaysia Bhd Kuala Trengganu v. Mae Perkayuan Sdn Bhd & Anor* [1993] 2 CLJ 495, where Abdul Hamid Omar LP stated:

> ... The bank's claim for recovery of the loan was entirely a separate matter from the first respondent's claim for damages against the bank. There is no ground in law for exempting the first respondent from liability to repay the loan.

We take this opportunity to, with respect, reiterate and uphold the decision in *Mae Perkayuan* as reflecting the correct position in law. It should be followed and ought not to be deviated from.

[30] On the occurrence of a breach, the aggrieved party can elect to terminate the contract and sue for damages to reinstate him to his original position. Alternatively, the aggrieved party, here GMH, can affirm the

contract and sue for damages at the end. In the instant case, GMH did not immediately call upon the breach and terminate the agreement. So, it follows that GMH effectively affirmed the contract. Its claim, if breach was established, was to make a claim for damages to be assessed. This does not entitle GMH to be exonerated from making repayment on the express terms of the FFA.

[31] For this reason alone, the decisions of the High Court and the Court of Appeal are flawed. There is no coherent legal basis for such a conclusion to be reached. And the repercussions of such a legally flawed conclusion are grave to these fundamental industries, which form the cornerstone of the economy.

Issue 2: Was There A Breach Of The FFA?

[32] The second issue relates to whether the bank breached its obligations by not making payments out from the proceeds to GMH's subcontractors, vendors and suppliers during the pendency of the *Mareva* injunction proceedings. It is true that no order for the grant of a *Mareva* existed on 7 June 2010 when the 29th interim certificate was received by the bank. The *Mareva* was granted on 22 July 2010. In these circumstances, the trial court relied on *Jasa Keramat Sdn Bhd v. Monatech (M) Sdn Bhd* [2001] 4 CLJ 549 ('*Monatech*') where Abdul Hamid Mohamad JCA (later CJ) set out the law relating to whether an act amounts to an interference with the due administration or the course of justice so as to constitute contempt of court. The judgment clearly stipulates that each case will turn on its facts and that it is not every proceeding filed in court that requires all contractual obligations to be stayed pending determination of the court proceedings. The elements of good faith and acts conducted in the ordinary course of business will not necessarily amount to contempt as compared to acts undertaken with a view to frustrate the proceedings, rendering any subsequent order of the court ineffective and fruitless.

[33] The High Court found that the bank had breached its obligations because it took the view that even with notice of the injunction application by SF, the proceeds ought to have been released to GMH's third party contractors, vendors and suppliers.

[34] The Court of Appeal concurred with this conclusion.

[35] With respect, having considered the context and facts of the instant appeal, it is evident that the bank having notice of the dispute between SF and GMH, and more particularly having been served with notice of the application for an injunction, could not simply proceed to disburse monies to third party contractors under the guise of the "ordinary course of business" clause. This is because it was those very monies that comprised the subject matter of the dispute between the parties. This is evident from a perusal of the actual notice of application for the *Mareva* injunction which targeted the project account, where the disputed monies were held.

[36] It was not a case where SF had agreed or consented to the surplus being used to pay third party contractors. The entirety of the monies were in dispute, save for instalment repayments to the bank. If the bank chose to disburse the monies notwithstanding having notice of the pending *Mareva*, and the *Mareva* was subsequently granted as was the case here, it would have meant that the bank had disbursed monies which were rightfully to be "frozen" or kept, pending the determination of the full dispute between SF and GMH. The deliberate act of the bank in choosing to disburse the monies despite having notice could very well be said to amount to an interference with the adjudication of the matter because the very subject matter of the dispute, was being disbursed or distributed, notwithstanding the fact of adjudication pending before the courts. This is tantamount to pre-determining the dispute and could therefore be viewed as amounting to contempt.

[37] The courts below therefore erred in concluding that the bank breached its obligations by failing to disburse monies to GMH's third party contractors. In reaching our conclusion, we are supported by *Monatech* in that the case clearly stipulates that each matter must be considered in the context of its circumstances. The trial judge and then the Court of Appeal failed to reach a reasonable conclusion in concluding that it was incumbent upon the bank to disburse notwithstanding a court adjudication pending in respect of the very monies that GMH directed it to disburse.

[38] In any event, banks should not be placed in the somewhat invidious position of effectively adjudicating the dispute when the matter is before the court. It would also require the banks to make a judgment call on what amounts to "ordinary course of business" which it is not obliged to do under the terms of the financing facility in a situation such as the present. In this context, we also adopt the excerpts from Lord Mustill's judgment in *Harrow London Borough Council v. Johnstone* [1997] 1 WLR 459 at p. 469 which stipulates, *inter alia*, that even if there is no injunction in place to preserve the subject matter of an action, "a wanton destruction of that subject matter with the intention of impeding a fair and fruitful trial is capable of being a contempt of court". This is also the principle cited in *'Arlidge, Eady & Smith on Contempt'* (5th edn, Sweet & Maxwell). See also *Z Ltd v. A & Ors* [1982] 1 All ER 556 and *Customs And Excise Commissioners v. Barclays Bank Plc* [2007] 1 AC 181.

[39] Although these latter two cases relate to notification to a bank of the existence of a *Mareva* injunction, the fact that the bank in the instant appeal was notified of the application to obtain a *Mareva* injunction by SF is, in itself, sufficient to put the bank on notice to be vigilant and careful about the monies sought to be preserved. As the monies sought to be preserved were the very monies which GMH sought disbursement of to third party contractors, the bank cannot be faulted for taking the cautious and prudent

step to stay its hand in the face of the adjudication by the court. It could not take the risk of pre-empting or rendering nugatory any subsequent order the court might make.

[40] On the facts of the matter in the instant appeal, it is clear that the bank did not breach the financing facility agreement.

[41] Therefore, there was no breach of such agreement which could be utilised as the basis for seeking damages against the bank, far less "exonerating" the borrower and the guarantors from having to repay monies utilised by the borrower and principal debtor.

Issue 3: Cause Of Action Against The Guarantors

[42] This issue ties back to questions of law 4 and 5 in respect of which leave was granted.

[43] The relevant facts are that:

(i) the High Court suit was filed against the bank and GMH by SF on 11 June 2010;

(ii) the bank filed its defence on 14 July 2010;

(iii) the bank made demands of the guarantors on 29 October 2010;

(iv) the bank amended its defence to include the bank's counterclaim against GMH as additional parties on 1 March 2011.

[44] The courts below held that the bank enjoyed no valid cause of action against the guarantors because premised on the relation back theory, the amendment to the bank's counterclaim related back to either the filing of the original writ by SF, or the filing of the bank's defence.

[45] This is a flawed conclusion as s. 31 of the Limitation Act 1953 expressly provides that "for the purposes of this Act, any claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded." This means that the bank's counterclaim is a separate action (see more pertinently O. 15 r. 2 of the Rules of Court (ROC) 2012) and commenced on 1 March 2011. This in turn means that the claim by the bank against the guarantors *vide* the counterclaim was instituted after the issuance of the demands to the guarantors on 29 October 2010.

[46] More significantly perhaps, this provision only applies in relation to limitation of actions or arbitrations as it is contained in the Limitation Act 1953. In short, if limitation is an issue in relation to the amendment of a claim. That is not the case here. (See also *Alloy Consolidated Sdn Bhd & Anor v. Dato' Dr Hj Adam Harun* [2011] 5 CLJ 705; [2011] 5 MLJ 655 which refers to limitation).

[47] As for the relation back theory, we concur with the position of the appellant that there was no proper basis to apply the "relation back" theory to the case at hand because the bank's claim against the guarantors is separate and distinct from SF's or GMH's causes of action against the bank. There is no legal coherence nor grounds in principle to "deem" that the bank's counterclaim against the guarantors brought in March 2011, should be related back to the date of SF's action instituted in June 2010.

[48] The bank's counterclaim against GMH is an independent action which stands on its own. Therefore, in determining the date of the bank's recovery action, it stands to reason that the correct date, applying O. 15 r. 2 of the ROC is 1 March 2011. The bringing of that action by the bank cannot be related back to SF's writ or claim against GMH and the bank because firstly, the relation back theory has no application here and secondly, as stipulated in *The "Jarguh Sawit"* [1997] 1 SLR(R) 213, such a counterclaim takes effect from the date of its filing.

[49] Therefore, the submission by the guarantors that the relation back theory takes the date of the bank's counterclaim back to June 2010, namely the date of SF's writ, is flawed. As of 1 March 2011, the notices of demand had been issued to the guarantors. These notices were issued on 29 October 2010. Therefore, the reality is that the bank enjoyed a cause of action against the guarantors as of 1 March 2011. The courts below erred in applying the relation back theory to conclude that there was no valid cause of action against the guarantors.

[50] We now answer the questions of law as follows:

Q1. Whether a breach of a facility agreement by a bank disentitles it, as a matter of course and without more, from recovering monies owed to the bank by the borrower from the borrower or guarantors.

With respect to question 1, the answer is no.

Q2. Where a bank is given notice of a pending application for a *Mareva* injunction in respect of monies it holds, is the bank legally justified in withholding payment pending the determination of the said application in light of the decision of the Federal Court in *Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd* [2002] 4 CLJ 401.

With respect to question 2, the answer is yes.

Q3. Where a bank is given notice of a pending application for a *Mareva* injunction in respect of monies it holds, is it permitted to pay monies out in the ordinary course of business in its absolute discretion, such that is not open to the bank being made the subject of contempt proceedings for interfering with the due administration of justice.

With respect to question 3, the answer is no in the circumstances of this appeal.

Q4. Whether s. 31, Limitation Act 1953 applies to an amendment to a defence to include a counterclaim such that it relates back to the date of filing of the writ.

With respect to question 4, we do not answer the same as the question of limitation does not arise.

Q5. Whether an amendment to a defence to include a counterclaim is subject to the "relation back" theory or the "useful purpose" theory.

We decline to answer question 5.

Q6. Whether a defendant to a counterclaim is estopped from taking issue with the validity of the amendment to the defence pursuant to which the counterclaim was introduced by reason of his having consented to it.

Similarly, we decline to answer question 6.

[51] In these circumstances, we are satisfied that the appeal has merits and grant the appellant the following reliefs:

(i) the appeal is allowed with costs here and below;

(ii) the orders of the High Court and the Court of Appeal are set aside;

(iii) the bank's counterclaim is allowed as against GMH and the guarantors, namely R3 to R6 in terms of the prayers in the counterclaim, save for the costs claimed on a solicitor-client basis which should be on a party-to-party basis as conceded by learned counsel for the bank before us;

(iv) for avoidance of doubt, judgment is entered against GMH and the guarantors, namely R3 to R6 in the amount of RM24,003,368.53 together with "*ta'wid*" at the rate of 1% per annum on the said amount from 29 October 2010, the date of termination of the banking facility by the bank and interest at the contractual rate of 8% on the amount of RM24,003,368.53 from 29 October 2010 until date of realisation;

(v) with respect to costs here and below, we award costs of RM200k payable by the first respondent, GMH to the appellant bank subject to allocatur and costs of RM150k payable by the third to sixth respondents to the appellant bank subject to allocatur for costs here and below.